Filed 10/25/16 In re I.D. CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| In re I. D. et al., Persons Coming Under the Juvenile Court Law. | C081281 |
| SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>C. B. et al.,<br><br>Defendants and Appellants. | (Super. Ct. Nos. J05395, STKJVDP20100000047) |

Appellants, parents of the minors, appeal from the juvenile court's orders terminating their parental rights and freeing the minors for adoption.[1] (Welf. & Inst.

[1] Appellant R. B. is father to only minors G. B. and N. B. Thus, he appeals the termination orders with respect to those two minors only.

Code, §§ 366.26, 395.)[2] They contend the juvenile court erred in denying mother's request to examine the two youngest minors at the hearing. They also contend the juvenile court erred in finding that the beneficial parental relationship exception to adoption did not apply. We affirm.

BACKGROUND

I. D. (born in 2003) is the son of appellant mother. G. B. (born in 2006) and N. B. (born in 2008) are the sons of appellant mother and appellant father. In 2009 and 2010, prior to the minors' detention, multiple referrals were made alleging the three minors were at risk due to substance abuse and domestic violence between the mother, father, and the minors.

On March 17, 2010, the maternal grandmother, who had been called to the house by mother, removed the minors to her vehicle and called authorities. The parents were hallucinating about demons, father had choked G. B. by pouring "devil water" down his throat, and I. D. had scratches to his face and arms inflicted by father. Both parents were arrested after police observed them yelling and screaming about the end of the world, yelling at the maternal grandmother to take out the demons, and exhibiting likely methamphetamine use. The minors were detained and appellants were both charged with cruelty to child by inflicting injury and being under the influence of methamphetamine. Father was also charged with resisting arrest. All three minors were observed to have various injuries, including burns, scratches, bruises, and bumps.

A section 300 petition was filed on behalf of the minors alleging the minors were at substantial risk of serious physical harm due to the events of March 17, 2010, and the history of substance abuse and domestic violence, including a prior dependency in 2004 regarding I. D. The juvenile court sustained the petition and, on July 13, 2010, declared

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[2] Undesignated statutory references are to the Welfare and Institutions Code.

the minors dependents of the court. I. D. was placed with his biological father with family maintenance services, and G. B. and N. B. were placed with the maternal grandmother with reunification services.

On February 25, 2011, a supplemental petition was filed on behalf of I. D. alleging neglect by his biological father. The petition was sustained and I. D. was placed with his half siblings in the care of the maternal grandmother with reunification services.

On March 29, 2011, father completed a psychiatric evaluation. On Axis I, he was diagnosed with polysubstance abuse, psychotic disorder in remission, probably substance induced. On Axis II, he was diagnosed with personality disorder, not otherwise specified, with antisocial, paranoid, and passive-aggressive features. On Axis III, he was diagnosed with edentulous secondary to chronic methamphetamine use. The doctor opined father was not able to appropriately parent his children, although he might make permanent changes in the future.

On April 6, 2011, mother completed a psychiatric evaluation. On Axis I, she was diagnosed with polysubstance abuse, psychotic disorder, methamphetamine induced, in remission. On Axis II, she was diagnosed with a personality disorder, not otherwise specified, with narcissistic and codependent features. The doctor was of the opinion that mother was not currently capable of appropriately and safely parenting her children.

On September 26, 2011, the social worker reported both I. D. and G. B. loved their mother but were terrified of father and did not believe they would be safe in mother's care. All three minors were showing signs of posttraumatic stress disorder (PTSD) from exposure to domestic violence and appellants' drug use. The juvenile court terminated reunification services and set a section 366.26 hearing.

The social worker recommended a permanent plan of guardianship by the maternal grandmother based on the benefit to the children from continuing their relationship with the parents and the maternal grandmother's unwillingness to adopt. On April 11, 2012, the juvenile court selected guardianship as the permanent plan for G. B.

and N. B. and issued letters of guardianship for the maternal grandmother. On May 16, 2012, the juvenile court terminated their dependency. On July 26, 2012, the juvenile court selected guardianship as the permanent plan for I. D. and issued letters of guardianship for the maternal grandmother.

On December 4, 2014, the San Joaquin County Human Services Agency (Agency) filed a petition for modification seeking reinstatement of the dependency and change of permanent plan as to each minor pursuant to section 366.26. The stated change in circumstances was the maternal grandmother's willingness to adopt. On January 22, 2015, the juvenile court reinstated the dependency and set a selection and implementation hearing for all three minors.

On February 6, 2015, the juvenile court ordered a bonding study of G. B. and N. B. with parents, and I. D. with mother, and ordered supervised visitation (except as between father and I. D.). Mother then filed a section 388 petition for modification, reiterating her previously granted request for a bonding study and seeking return of all of the minors to her and father's custody. Father also filed a section 388 petition for modification, requesting the court consider the upcoming bonding study and return G. B. and N. B. to his custody.

The June 25, 2015, bonding study contained data from court documents, play observations, and miscellaneous notes and documents. Additionally, the bonding study included interviews with appellants, minors, maternal grandmother, I. D.'s therapist, a maternal cousin (visit supervisor), Ms. Rodriguez (visitation center visit supervisor), and a maternal uncle (visit supervisor). The evaluators noted that supervised visits were fine but unsupervised visits were problematic. The minors did not trust mother to keep them safe and wanted to continue to reside with the maternal grandmother. The minors were strongly bonded to the maternal grandmother and their long-term stability was based on the stable, consistent, and responsive relationship they shared with her--not on maintaining contact with parents. The evaluators concluded that the bond between the

minors and parents was weak, whereas their bond with each other was strong and provided each other with a sense of safety, comfort, and support.

The social worker's October 2, 2015, report included statements provided by each of the minors about their wishes. I. D. stated he wanted to live with the maternal grandmother and wanted his brothers to live there with him. G. B. stated he wanted to live with the maternal grandmother and his brothers and move to Oklahoma (where the maternal grandmother has property). N. B. stated he wanted to live with the maternal grandmother forever, and live with his brothers, and move to Oklahoma. They each told the social worker they wanted to be adopted by the maternal grandmother.

On November 4, 2015, the juvenile court heard argument from the parties regarding appellants' requests (to which the Agency and the minors' counsel objected) that the minors testify at the upcoming combined section 388 and section 366.26 hearing. The combined hearing commenced on November 9, 2015. The juvenile court determined that the minors would not testify. At the January 14, 2016, continued hearing, the juvenile court reiterated that it had denied appellants' request to have the minors testify out of concern for the minors' mental and emotional well-being. It also reemphasized that the bonding study and social worker's report provided sufficient information upon which to ascertain the minors' feelings about living with appellants, maternal grandmother, and each other.

On January 14, 2016, the juvenile court denied mother's section 388 petition, selected adoption as the permanent plan, and terminated parental rights.

## DISCUSSION

### I

### *Denial of Appellants' Request That Minors Testify*

Appellants contend the juvenile court's denial of their request to call the minors as witnesses violated their right to due process of law and constituted reversible error. They contend the juvenile court should have required G. B. and N. B. be made available to

testify. We review the juvenile court's exclusion of testimony decision for an abuse of discretion and find no abuse of discretion here. (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592; *In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1088-1089.)

On November 4, 2015, a hearing was held, at the request of minors' counsel, to argue against requiring the minors be made available on standby to testify at the upcoming combined section 388 and section 366.26 hearing and to quash appellants' subpoenas of the minors. The juvenile court initially indicated it was not sure whether they needed the minors' testimony. In response, minors' counsel argued that the minors had already been subjected to enough emotional and mental trauma, as I. D. began having nightmares again after receipt of the subpoenas, and none of them wanted to appear at the hearing. Minors' counsel argued that the questions that would be asked were already answered in detail in the bonding study. In addition, the minors clearly stated that they all wanted to remain in the care of the maternal grandmother and were afraid of father. The Agency argued that the bonding study was very extensive and that the minors' testimony would not necessarily be relevant given the detail and the responses already provided in the study. Additionally, the Agency argued that I. D. was deathly afraid of father and testimony could cause a traumatic decline in his mental stability. Appellants argued that they had a right to cross-examine the minors and the minors should be subject to the subpoena.

The juvenile court found that the minors had chosen to absent themselves from the hearing and were not interested in testifying. It further found that it did not need live testimonial evidence from the minors in light of information contained in the bonding study and social worker's report. Finally, it found that it would be harmful to the minors to require them to testify, and especially traumatic and damaging to I. D.'s mental health. Accordingly, the minors were not required to appear and testify at the hearing.

Parents in dependency proceedings have a due process right to call and examine witnesses. (*In re Malinda S.* (1990) 51 Cal.3d 368, 383; *In re Amy M.* (1991)

232 Cal.App.3d 849, 864.) Moreover, pursuant to section 366.26, subdivision (h), the juvenile court was required to consider, to the extent ascertainable, the children's wishes and to act in their best interests. (*In re Leo M., supra*, 19 Cal.App.4th at p. 1591; *In re Juan H.* (1992) 11 Cal.App.4th 169, 173.) The court is not required to ask the child how he or she feels about the termination of parental rights--that is, ending the parent-child relationship. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 820; *In re Leo M.*, at pp. 1591-1592.) As the Court of Appeal held in *In re Leo M.*: "[I]n honoring [the minors'] human dignity . . . we should not carelessly impose upon them decisions which are heavy burdens even for those given the ultimate responsibility to decide. To ask children with whom they prefer to live or to ascertain what they wish through other evidence is one thing. To ask those children to choose whether they ever see their natural parent again or to give voice to approving that termination is a significantly different prospect. . . . [W]e conclude that in considering the child's expression of preferences, it is not required that the child specifically understand the proceeding is in the nature of a termination of parental rights." (*In re Leo M.*, at p. 1593.)

Evidence of a child's wishes may but need not take the form of direct testimony in open court or in chambers. (§ 366.26, subd. (h); *In re Amber M.* (2002) 103 Cal.App.4th 681, 687-688; *In re Amanda D., supra*, 55 Cal.App.4th at p. 820; *In re Leo M., supra*, 19 Cal.App.4th at p. 1591.) Evidence can be found in reports prepared for the hearing. (*In re Amanda D.*, at p. 820; *In re Leo M.*, at p. 1591.) The juvenile court is required to direct the department and adoption agency to "prepare an assessment that shall include: [¶] . . . [¶] a statement from the child concerning placement and the adoption or guardianship . . . unless the child's age or physical, emotional, or other condition precludes his or her meaningful response . . . ." (§ 366.21, subd. (i).)

Whether to require or allow a child's in-court or in-chambers testimony as to his or her wishes is within the sound discretion of the juvenile court. (*In re Leo M., supra*, 19 Cal.App.4th at p. 1592; *In re Jennifer J., supra*, 8 Cal.App.4th at pp. 1088-1089.) The

juvenile court may conclude that the potential harm to the youngster outweighs any benefit to be gained by his or her direct testimony. (*In re Juan H., supra*, 11 Cal.App.4th at pp. 172-173; *In re Jennifer J.*, at p. 1086; see also *In re Leo M.*, at p. 1592 ["[some children] may be permanently and severely traumatized if asked to grapple with the possibility of severing all ties to their biological parents"].) Additionally, the juvenile court can require a sufficient offer of proof to ensure that, before limited judicial and attorney resources are committed, the parent has evidence of significant probative value to present. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122.)

Appellants here did not establish the probative value of requiring the minors' live testimony. Instead, appellants sought the required testimony of the minors because they believed they had a "constitutional right." "Of course a parent has a right to 'due process' at the hearing under section 366.26 which results in the actual termination of parental rights. This requires, in particular circumstances, a 'meaningful opportunity to cross-examine and controvert the contents of the [social worker's] report.' [Citations.] But due process is not synonymous with full-fledged cross-examination rights. [Citation.] Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.]" (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817.) Due process does not require the juvenile court to permit appellants to introduce irrelevant or cumulative evidence. (See *In re Tamika T., supra,* 97 Cal.App.4th 1114, 1122.)

Appellants now argue that without the minors' live testimony, the juvenile court did not have current information and, therefore, it was error not to require their presence at the hearing. Setting aside the fact that appellants did not present this argument to the juvenile court as a basis for seeking the minors' live testimony, the most recent statements by the minors were contained in a social worker's report prepared on September 1, 2015--two months before commencement of the hearing. Such evidence is hardly stale. And those statements were consistent with their earlier statements--such as

those in the June 25, 2015, bonding study report. Indeed, the minors' feelings toward appellants and their placement had not substantially changed in the past five years that they had been living with the maternal grandmother.

Appellants also appear to contend that the only circumstance in which the juvenile court can refuse to require the attendance and testimony of a minor in a dependency matter is when all three of the exemplary facts set forth in *In re Jennifer J.* have been established--(1) where "the child's desires and wishes can be directly presented without live testimony, [(2)] where the issues to be resolved would not be materially affected by the child's testimony, and [(3)] where it is shown that the child would be psychologically damaged by being required to testify," the juvenile court "has the power to exclude such testimony." (*In re Jennifer J.*, *supra*, 8 Cal.App.4th at p. 1089.)[3]

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[3] Specifically, the court in *In re Jennifer J.* held: "[I]t is within the juvenile court's discretion to exclude the testimony of a child in order to avoid psychological harm to the child, even though that testimony is relevant, the child is competent to testify, and the child is both practically and legally 'available' to testify." (*In re Jennifer J.*, *supra*, 8 Cal.App.4th at p. 1088.) "[T]he juvenile court judge in a proper case may refuse to require the attendance and testimony of the child who is the subject of the litigation. This power derives, we believe, from a recognition of the overriding objective of the dependency hearing--to preserve and promote the best interests of the child. It would be a perversion of the procedure to impose upon it a requirement that the child's testimony *always* be presented, regardless of the trauma resulting to the child therefrom, and regardless of the necessity of such testimony in the resolution of the issues before the court. The refusal of the court to issue process requiring the attendance and testimony of the child should, assuredly, be a decision made only after a careful weighing of the interests involved. . . . '[F]undamental rights are implicated in dependency proceedings, and they cannot be abrogated with impunity.' Where, however, the child's desires and wishes can be directly presented without live testimony, where the issues to be resolved would not be materially affected by the child's testimony, and where it is shown that the child would be psychologically damaged by being required to testify, we hold the juvenile court judge has the power to exclude such testimony." (*Id*. at p. 1089, fn. omitted.)

We need not decide whether such is the only circumstance in which the juvenile court has the power to refuse to require the minors' live testimony. Even assuming that were the case, all three factors are present here. As we have explained, the juvenile court had a detailed social worker's report and bonding study before it, which directly addressed the minors' wishes and relationship with appellants. We reject appellants' assertion that such information, prepared only months before commencement of the hearing, was stale. Thus, the first two factors are present--the minors' wishes were presented without live testimony and the issues to be resolved had been addressed through the reports, and would not be materially affected with cumulative live testimony.

With respect to the third factor, we also disagree with appellants that there was no allegation the two younger minors would be psychologically damaged by being forced to testify.[4] While there may not be evidence that the two younger minors were still suffering from mental health or emotional issues, they had suffered severe abuse and trauma at the hands of appellants. In objecting to appellants calling the minors as witnesses, their counsel reminded the court that all three minors had struggled emotionally and mentally as a result of appellants' actions. All three had developed signs of PTSD, required counseling and therapy, and had suffered from nightmares regarding their exposure to the domestic violence. G. B.'s nightmares continued for years as he grappled with the abuse and father's attempt to drown him. G. B. later displayed bouts of anger outbursts and was referred to family counseling. The minors were extremely afraid of father and did not want to attend the hearing or testify. And, by requiring the minors to testify, their counsel stated they would feel responsible for the outcome. This constituted a sufficient basis for the juvenile court to conclude that the two younger

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[4] It is not disputed that there was sufficient evidence to find I. D. would be traumatized if forced to testify. It was reported that, upon learning of the subpoena, I. D. regressed and began having nightmares again and was smearing feces on the walls.

minors, as well as I. D., would have been intimidated and harmed by having to testify, whether or not appellants were present.

In sum, the record reflects a careful weighing by the juvenile court of the competing interests involved and consideration of the state of the evidence and what additional evidence may be relevant to its decision. The juvenile court had before it the positions of all parties and a record containing ample evidence of the minors' wishes and circumstances. The juvenile court balanced the potential harm to the minors against the limited probative value of their testimony, and properly exercised its discretion by precluding appellants from forcing their live testimony. There was no error.

II

*Determination That Beneficial Parental Relationship Does Not Apply*

Appellants contend the juvenile court erred by finding the beneficial parental relationship exception to adoption did not apply. They argue mother's relationship with the minors was sufficiently strong to compel application of the exception. There is no error.

At a hearing under section 366.26, if the juvenile court finds, as it did here, that a minor is likely to be adopted, the court must select adoption unless under section 366.26 "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" under at least one of six exceptions. (§ 366.26, subd. (c)(1)(B).) The parent has the burden of establishing by a preponderance of the evidence that a statutory exception to adoption applies. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 998; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

To establish that the beneficial parental relationship exception to adoption applies, the parent must show that termination of parental rights would be detrimental to the minor because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) "Because a section 366.26 hearing occurs only after the court has

repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) When the juvenile court rejects an exception to adoption, we review the court's finding deferentially. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 [whether standard of review deemed substantial evidence or abuse of discretion, broad deference to lower court required]; *In re Jasmine D.*, at p. 1351 [abuse of discretion]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 [substantial evidence].)

To prove that the beneficial parental relationship exception applies, "the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits--the parent must show that he or she occupies a parental role in the life of the child." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) Moreover, it is not enough simply to show "some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1349.) "[T]he parent must show that severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

Although mother maintained regular visitation and the supervised visits went well, the minors appeared more focused on playing with each other than interacting with mother. The sibling bond was proven to be far more reliable, consistent, and sustainable than the relationships the minors have with appellants.

I. D. (age 12), G. B. (age nine), and N. B. (age seven) had been residing with the maternal grandmother under a legal guardianship for over five years prior to the hearing. Moreover, the years the minors spent living with appellants were characterized by the exposure to domestic violence, drug abuse, and a lack of protection from emotional and physical abuse. G. B. was removed from appellants' custody when he was only three

years old, and N. B. was removed at age one and does not even remember residing with appellants. G. B. indicated he would not really care if he did not see appellants again, remarking that he would have pictures, as if that would be sufficient to satisfy him. I. D. was still terrified of father and, although he loves his mother, did not have a strong bond with her and did not want more contact with her. Moreover, he viewed his role with mother as "protector," believing she was unable to protect herself or her children from father--which the juvenile court could reasonably conclude not to be a "positive" emotional attachment.

Each minor participated in a bonding study and none of the minors were found to have a strong bond with either parent. Overall, the relationship between mother and the minors was described by the bonding study evaluators as generally positive, but ambivalent and weak with a tenuous bond. The bonding study concluded that mother had not established the foundation of an enduring parent-child relationship with either G. B. or N. B. I. D.'s relationship with mother was "characterized by great ambivalence," and his exposure to abuse and violence, from which mother failed to protect him, prevented him from viewing her as a primary, predictable source of physical and emotional security. On the other hand, the bonding study revealed that the minors looked to the maternal grandmother to provide a safe home environment and did not want to return to appellants' custody.

In sum, appellants failed to prove that mother's natural parent-child relationship promoted the well-being of any of the minors to such a degree as to outweigh the well-being they would gain in a permanent home with the maternal grandmother, with whom they were strongly bonded and upon whom their long-term stability relied. (See *In re S.B.* (2008) 164 Cal.App.4th 289, 297; accord, *In re Jasmine D., supra*, 78 Cal.App.4th at p. 1345.)

## DISPOSITION

The orders of the juvenile court are affirmed.

/s/ _____,
Robie, J.

We concur:

/s/ _____,
Blease, Acting P. J.

/s/ _____,
Mauro, J.